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**2 UNITED STATES BANKRUPTCY COURT**

**3 SOUTHERN DISTRICT OF NEW YORK**

4 Case No. 09-50026-reg

**6 In the Matter of:**

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8 MOTORS LIQUIDATION COMPANY, ET AL.,

**9 f/k/a GENERAL MOTORS CORPORATION, ET AL.,**

10

## 11 Debtors.

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15 U.S. Bankruptcy Court

16 | One Bowling Green

17 New York, New York

18

19 April 12, 2011

20 9 : 47 AM

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22 | B E F O R E :

**23 HON. ROBERT E. GERBER**

24 U.S. BANKRUPTCY JUDGE

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2      **Hearing re: Valuation Methodology Issues Related to the Motion**  
3      **of the TPC Lenders**

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25      **Transcribed by: Dena Page**

Page 3

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1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: Good morning.

4 Now, have a seat, please.

5 We're here on GM's dispute with the TPC lenders. And  
6 what I want to do is get appearances by each of you sitting  
7 down, and then I have some preliminary comments. First, for  
8 the TPC Lenders?

9 MR. BIERNAN: Steven Bierman, Sidley Austin.

10 THE COURT: All right, Mr. Bierman.

11 MR. BIERNAN: With me are Nicholas Lagemann and  
12 Kenneth Kansa --

13 THE COURT: Okay.

14 MR. BIERNAN: -- also from Sidley. Thank you.

15 MR. STEINBERG: Good morning, Your Honor. Arthur  
16 Steinberg from King & Spalding on behalf of New GM. To my  
17 right is my colleague Scott Davidson, as well as my colleague  
18 Slate Dabney.

19 THE COURT: Okay, thank you, gentlemen.

20 Gentlemen, I have problems with both sides' positions,  
21 but especially with New GM's. Subject to your rights to be  
22 heard, and I've read all your briefs, it seems to me that I  
23 have to construe a cause that has three separate components:  
24 fair market value, under 506, and as the date of the filing.  
25 And I would like each of you, when it's your turn to speak, to

Page 6

1 address my instinct which is that I have to give each of those  
2 three separate components meaning, and that I have to construe  
3 the clause as an entirety and in a fashion that gives each one  
4 of those three clauses a role in life. I would like each of  
5 you to expressly address whether you disagree with that  
6 assumption.

7 Now, it seems to me that fair market value, those  
8 three words or that clause is actually subject to a double  
9 entendre. Mr. Steinberg, when it's your turn, I'll need you to  
10 help me understand whether you're contending in substance that  
11 it's a word of art that also defines the valuation mechanism,  
12 at least in this context.

13 If I understand the lenders' position, they're  
14 contending that it's more of a generic term that takes its  
15 meaning from the purpose for which the fair market value  
16 determination is to be used.

17 I have seen the many, many references to Rash, and  
18 also have read it. I have some material difficulty in seeing  
19 how the valuation of a truck for Chapter 13 purposes where the  
20 debtor uses his truck has very much factual relevance to this  
21 case. And what I need both sides to address is the extent to  
22 which Rash sets forth principles that apply beyond a Chapter 13  
23 context and beyond a situation in which a debtor is going to be  
24 continuing to use its truck going forward. Putting it  
25 differently, I want you to slice and dice what Rash says to

Page 7

1 separate principles of general application on the one hand to  
2 those that don't make much sense outside of a Chapter 13  
3 context on the other.

4 Also, when we talk about value and use, which is my  
5 preferred method of describing the lenders' valuation doctrine,  
6 or preferred valuation doctrine, I have big time problems with  
7 the use of the word "replacement value" because I think that,  
8 too, is at best subject to a double entendre, and I mean, I  
9 don't want to speak disrespectfully of anybody, but I don't  
10 think that really captures the concept or at least the concept  
11 that I would be interested in because subject to your rights to  
12 be heard, it appears to me that even if I were to agree with  
13 the lenders on other aspects, we wouldn't be talking about  
14 replacement value in the sense that replacement value is  
15 normally thought of, like the replacement value in the  
16 insurance on my house where they're going to pay for getting me  
17 a new house whatever it costs to rebuild it, but instead is  
18 what a third party purchaser would pay for the property to use  
19 it for the same purpose for which it's being used now. To the  
20 extent that the lenders want to digress from that  
21 understanding, you'd have to give me some greater comfort that  
22 that could ever be appropriate. I have considerable problems  
23 with that.

24 With that said, I don't care who goes first. It's my  
25 understanding that you submitted a first wave of briefs

Page 8

1 simultaneously and then did supplemental briefs simultaneously,  
2 and I'm going to give both sides an opportunity to reply. And  
3 if it's technically considered a surreply, so be it. So with  
4 that said, who -- do you have an understanding as to who's  
5 going to go first?

6 MR. STEINBERG: I'm happy to go first.

7 THE COURT: Okay, Mr. Steinberg, I'll hear from you.

8 MR. STEINBERG: Your Honor, if I can address the  
9 questions that you asked first to frame the argument, and then  
10 hopefully, if I don't lose track too much, I'll go back to what  
11 I had planned to say.

12 Your Honor had focused in on the language of the order  
13 and had focused in on three separate clauses and asked whether  
14 you had to separately construe each one of them and has  
15 indicated that your leanings was to do that, and we agree. And  
16 the three --

17 THE COURT: Well, actually, what I was thinking was  
18 trying to derive a meaning from the unified whole from the  
19 totality of those three clauses.

20 MR. STEINBERG: Sure.

21 THE COURT: I don't know if that's the same thing  
22 you're saying or something different.

23 MR. STEINBERG: No, I think it's the same thing. And  
24 I think they all are integrated in the following respects.  
25 This clause was written as a compromise to an objection to a

Page 9

1 sale motion. It spans six or seven pages of an appropriate  
2 compromise to settle an objection that was raised in connection  
3 with that sale motion. The sale motion objection raised things  
4 like the ability of the TPC lenders to credit bid, and it had  
5 raised issues as to whether they should be able to sell  
6 pursuant to Section 363(f) of the Bankruptcy Code free and  
7 clear of their liens. So what you see as a result of the  
8 resolution of that objection and was the use of -- was this  
9 clause that you focused on. And they're all integrated.

10                 The term "fair market value" was a term of art. It  
11 was used in the agreement that way, and even if people didn't  
12 clearly focus that way, that would've been the natural result  
13 of what was happening before Your Honor in the summer of --  
14 when this -- in the summer of '09. There was a sale from Old  
15 GM to New GM. When someone sells assets in the context of a  
16 Chapter 11, a debtor to a third party, the issue is usually  
17 that the general standard is fair market value. Someone may  
18 quibble as to whether you should be doing it as a going concern  
19 value versus a liquidation value, meaning whether it was on a  
20 rush circumstances or not, and I think the parties agreed that  
21 we would use a going concern value, fair market value in the  
22 context of this sale that was taking place.

23                 Now, the reference to Section 506 is, as the Rash case  
24 focus in as to the second sentence of 506. You have to look at  
25 what the purpose of the valuation is and look at the

Page 10

1 disposition or the use of the property that's in question.  
2 Here, there wasn't a use. There wasn't a continued retention.  
3 There was a disposition. The disposition reflected in a sale,  
4 the purpose of the valuation was to value property in the  
5 context of the sale. And that's what happened here.

6 The third element to focus on was as of the date of  
7 the petition, that was when people were going to value the fair  
8 market value of this property. It wasn't going to be whenever  
9 this thing came up to be litigated. It was deemed to be as of  
10 that date, and that's why you see no confusion on this issue in  
11 the appraisals that were prepared because the parties tried to  
12 negotiate this resolution, the parties both agreed to prepare  
13 appraisals, and both appraisals were prepared as of the  
14 petition date. So people understood what that was about. And  
15 people also understood what fair market value was about. So  
16 there was an appraisal that was prepared by the TPC lenders and  
17 New GM. And both appraisals have the term "fair market value"  
18 and both define fair market value exactly the same way.

19 The TPC lenders, in addition to the fair market value,  
20 added at the request of the TPC lenders, asked their appraiser  
21 to prepare something called a value and use concept, something  
22 that I don't think in any way applies but has a way of  
23 ratcheting up the number.

24 And why does the value and use number differ from the  
25 fair market value number? And the reason is, if you look at

Page 11

1 the appraisal, there's two basic components there. There is a  
2 term called functional obsolescence and external obsolescence.  
3 And when doing a fair market value appraisal, you deduct  
4 functional obsolescence, things like in the context of the  
5 Tennessee facility, that there was an air conditioning facility  
6 that was built in that most buyers would not value when they're  
7 looking to buy the property, and therefore, there was a  
8 deduction for functional obsolescence, and external  
9 obsolescence, the cost of, in effect, replacing the facility  
10 and what would be the construction costs, et cetera.

11 And fundamentally, when you look at the appraisals,  
12 you see that when you do a fair market value approach -- and  
13 they both did it the same way, both our appraiser and their  
14 appraiser did it the same way -- when you do a fair market  
15 value, you look at a combination of the cost, the sales factor,  
16 and an income capitalization approach. And each of the  
17 appraisals go through those three approaches. It's not my  
18 attempt to try to argue the specifics of it, but I wanted to  
19 illustrate the difference between value and use and fair market  
20 value.

21 THE COURT: Pause please, Mr. Steinberg, because the  
22 examples you gave for functional obsolescence diverged a little  
23 bit from what my layman's instincts had told me, which is that  
24 functional obsolescence would deal with the extent to which it  
25 wouldn't be usable for the particular function that either Old

Page 12

1 GM, New GM, or some alternative buyer might want to use it for  
2 and that the distinction between value and use and fair market  
3 value might turn on the difference between what a strategic  
4 purchaser might want to use the property for on the one hand  
5 and a financial purchaser would, on the other.

6 MR. STEINBERG: No, that's not it. The functional  
7 obsolescence as used in the appraisal is actually defined and  
8 discusses why they made a deduction. It gives an example of  
9 the functional obsolescence that they're talking about.

10 The other obsolescence, the external obsolescence, is  
11 economic conditions, et cetera. Those are ignored when you're  
12 doing a value and use concept because it's deemed that the  
13 entity is, in effect, going to retain the use, and therefore,  
14 they don't care what the market would value it at. And those  
15 points are illustrated by the appraisal itself. And what's  
16 interesting when you actually go through the appraisal -- and I  
17 apologize because this aspect was not as well-briefed as I  
18 would have liked to see it, so I'd like to be able to take you  
19 through it -- is that when you do the market value, you have  
20 the three tests, and then you balance the three tests: costs,  
21 sales, and income capitalization. And when you do the value  
22 and use, you only focus on the cost factor. It's the same  
23 test, but you're ignoring -- you're only looking at the cost,  
24 and you're not looking at the sales and the income cap for  
25 purposes of determining market value. And when you actually

Page 13

1 look at the appraisal, you see that --

2 THE COURT: Pause please. I'm not going to put a sock  
3 in your mouth, Mr. Steinberg, but it seems to me that I thought  
4 my purpose on this hearing was to determine legal principles  
5 upon which the appraisals would later proceed, rather than  
6 doing kind of like a bottom's up thing where I try to take the  
7 appraisals and determine the legal principles. It would seem  
8 to me that whatever the appraisers did up to this point is  
9 irrelevant to my legal decision.

10 MR. STEINBERG: No, Your Honor, I think that I can tie  
11 it in in a very short order. When you look at the appraisals  
12 and they say what's the appropriate test for establishing the  
13 market value of these properties, they say, in the case of the  
14 Tennessee property, the best test is the sales test. And in  
15 connection with the Maryland property, they say the best test  
16 is the income capitalization test. That's their appraisals.

17 Both the sales test and the income capitalization test  
18 are not part of the test for purposes of value and use.  
19 They're only used for purposes of doing the market valuation  
20 tests. So my point of illustrating the appraisals is that  
21 their own appraisal recognizes itself that there's a way to  
22 market value and that an overreliance on the cost factor, which  
23 is the premise of the value and use concept, should not be used  
24 in this case, and that in one property it's the sales and in  
25 one property it's the income cap.

Page 14

1           So I'm not trying to argue what -- whether they did it  
2 right or whether they did it wrong. All I'm saying to you is  
3 that their appraiser themselves made the determination that in  
4 order to do value and use, the only factor you look at is cost,  
5 and the cost factor is the least significant factor in this  
6 case for purposes of valuing the market value of the property.  
7 And that's the point I'm trying to illustrate, which is that  
8 value and use is used for a specialized purpose for a specific  
9 buyer. It is not the test for what the market will test for as  
10 a general basis for the case. And I could point to the  
11 specific sections of the appraisal if Your Honor would find it  
12 helpful to look at to illustrate what I just said as to the  
13 emphasis on the sale and the income cap and the underreliance  
14 and the improper-to-rely-on, the cost factor. And that the  
15 cost factor is the premise of the value and use.

16           And the cost factor starts with replacement value.  
17 When you do the cost factor test, you start with replacement  
18 value, and then you make deductions. And the sole issue here,  
19 as in the difference in value and use versus market value, is  
20 that you're not deducting for the two types of obsolescences  
21 that I referred to before when calculating the value and use  
22 test. You're leaving it higher. And that is not what the  
23 appraiser, their appraiser says the market looks at for  
24 purposes of determining market value.

25           THE COURT: Mr. Steinberg, to what extent does case

Page 15

1 law support using cost for value and use?

2 MR. STEINBERG: Oh, I don't think it supports it at  
3 all.

4 THE COURT: Well, that's kind of what's troubling me.  
5 I had another case early in my tenure, about ten years ago,  
6 Global Crossing, where Global Crossing spent billions of  
7 dollars to create a fiber network that would be used for  
8 telecommunications. And when the whole company, including the  
9 totality of that fiber network was sold, the going concern  
10 value of the entire company, shorn, by the way, of its  
11 liabilities, was about a billion dollars. And any valuation  
12 method that placed material, much less excessive weight on cost  
13 to create the asset would reward somebody who was careless in  
14 running up expenses and building the facility and would have no  
15 relation to what the marketplace would pay for the asset, even  
16 for the particular use of -- let's take that example -- sending  
17 communications underneath the Atlantic Ocean.

18 Now, you're nodding. I don't know whether I'm arguing  
19 your position --

20 MR. STEINBERG: You are --

21 THE COURT: -- down the road, but I still see this as  
22 having little if any relevance to the legal issue that I'm  
23 asked to decide, today, at least.

24 MR. STEINBERG: Well, but that is what value and --  
25 that is what they're arguing value and use is, and I'm agreeing

Page 16

1 with you that it doesn't have any relevance. And in the  
2 example that you gave, an overbuild of the fiber optic network  
3 would have been the type of obsolescence which would be  
4 additional functional obsolescence which would be deducted from  
5 a fair market value appraisal but would not be deducted in a  
6 value and use appraisal. And that is exactly why when parties  
7 bargain for the standard in the sale order, they bargain for  
8 the fair market value standard, what a willing buyer and a  
9 willing seller would buy under the circumstance.

10                 And in the context of Section 506 which talks about  
11 use or disposition -- in this case, a disposition -- and we  
12 can't try to take a square peg and try to put it into a round  
13 hold and try to dream that this is a case like in Rash where  
14 the debtor retained the property and you were trying to value  
15 it for purposes of a secured creditor cramdown as to what it  
16 meant when the debtor was continuing to use the property  
17 because in this particular case, there was no debtor continuing  
18 to use the property. This was a third party sale to New  
19 General Motors. It was the kind of sale that had a specific  
20 363(m) good faith purchaser findings. Their briefing in this  
21 case tried to meld GM and New GM, but clearly the premise of  
22 the case in the sale order, that there was a sale to a distinct  
23 entity. And it was a purchase, and then therefore, in the  
24 context of a sale in a bankruptcy case under Section 363, the  
25 valuation standard, even if they had not specified it in the

Page 17

1 order, would have been fair market value. When you sell an  
2 asset, it's the fair market value of that asset. The only  
3 distinction would have been if it would have been liquidation  
4 value versus going concern value, and I'm prepared to say that  
5 it's a going concern value that should be valued for purposes  
6 of the TPC lenders' position.

7 The Rash case that Your Honor talked about, we have  
8 argued that the Rash case specifically doesn't have much  
9 application here because Rash -- the primary holding of Rash  
10 was should the Court have used a liquidation value versus a  
11 going concern value for purposes of a valuation. When Rash  
12 ultimately got to saying that it was a replacement value, then  
13 looked at the Ninth Circuit case and said, you know, in this  
14 context, replacement value is very close to fair market value.  
15 So Rash was really focused on going concern versus liquidation  
16 value in the context of a cramdown. We do not have a cramdown  
17 here. We have a sale. They do not cite one case, and I'm not  
18 aware of any case that would say you would use a liquidation --  
19 that you would use a value and use concept for purposes of  
20 valuing a sale in a Section 363 context because it's not  
21 important what a particular buyer's use was. They don't look  
22 at it that way. In fact, Rash said that I'm trying --

23 THE COURT: Excuse me. I don't need body language  
24 from the other side as Mr. Steinberg argues.

25 MR. STEINBERG: In fact Rash says, I'm not trying to

Page 18

1 do -- we're going to try to establish a firm rule for the facts  
2 of this case. We're not going to try to, in effect, create a  
3 situation where the lower courts can fashion their remedy in  
4 our particular circumstance based on what they see are the  
5 facts and circumstances. We want to set, in effect, a bright  
6 line for the issue that we're ruling upon.

7 And we cite into our case the Bell case which came out  
8 of the Bankruptcy Court for the Northern District of Indiana,  
9 and it said there that Rash says nothing about a setting of  
10 value based on the use which may be of use to a particular  
11 debtor. In fact, in Bell, the issue that came up there was  
12 that the debtor was, in effect, a farmer, and it had, like,  
13 twenty acres of vacant land. And when they did the valuation  
14 battle, they were trying to tell the court we're not using the  
15 land -- it's not being used for the purposes of farming, and  
16 therefore put a negligible value on the land. And the secured  
17 creditor was arguing but the land would have a value for an  
18 alternative use.

19 And certainly, when you value our interest, you have  
20 to look at what is not from the debtors' perspective its use  
21 but what the market would value its use for, and therefore, you  
22 needed to assess it not by how the debtor was going to use it  
23 but how the market would treat it and what people would pay for  
24 it. And in --

25 THE COURT: Pause please, Mr. Steinberg. You said

Page 19

1 Bell?

2 MR. STEINBERG: Bell. In re: Bell, 304 B.R. 878.

3 THE COURT: What's the name of the case?

4 MR. STEINBERG: In re: Bell, B-E-L-L.

5 THE COURT: Oh. Oh, I see. Okay.

6 MR. STEINBERG: And there, they reiterated the concept  
7 that I had just talked about before, in citing to Rash, they  
8 said that the Supreme Court rejected a ruleless approach to  
9 value based on the facts and circumstances of individual cases  
10 that a higher or better use of property than what the debtor  
11 was using it for must be taken into account when valuing the  
12 replacement value called for in Rash.

13 And then in the Perez case, P-E-R-E-Z, which is also  
14 cited by us, they, interpreting Rash, said that Rash did not  
15 set their standard for using replacement value in a nondebtor  
16 retention situation. So Rash had limited utility for the  
17 cramdown where the debtor is holding the property but  
18 otherwise, it's going to be a different circumstance.

19 And here, we think that the Rash case generally is a  
20 sort of a side show, that the parties actually contracted for  
21 what the standard should be, which is the fair market value  
22 which is built into the order. But even if the parties had not  
23 contracted for it, that would be the standard for a Section 363  
24 sale. That is the standard called for under Section 506 which  
25 talks about what is the purpose of the valuation and in what

Page 20

1 context are we doing the valuation. Here, it's a 363 sale in  
2 the context of a disposition. And the date would be we're  
3 valuing it as of the deemed sale date which would be the  
4 petition date.

5 So to sum up, Your Honor, and thank you for letting me  
6 speak longer than I thought I would, here, we believe that what  
7 Your Honor will ultimately be asked to do is to value these  
8 properties as what a third party in the marketplace would have  
9 paid for it, and that would be the equivalent of allocating the  
10 amount that GM paid. And it's not going to be based on what  
11 the particularized use that Old GM had for the property or even  
12 what New GM may want for the property. It's the best price  
13 that could be obtained for this property in the general market.

14 And that standard is something that everybody  
15 understood. It's not a vague concept. The appraisals were  
16 both done that way. The tests that were done to establish that  
17 were all done the same way. It's just a matter that people  
18 varied a little on the two particular properties. And the  
19 variance in the fair market value approach is eleven million  
20 dollars over two properties. The variance, when you put in the  
21 value and use concept, is thirty-four million dollars. And the  
22 primary thing, the twenty-three million dollar delta, twenty-  
23 one million dollars is simply because they deducted the two  
24 types of obsolescence they had before, which their own  
25 appraisals recognize is not relevant and not appropriate to do

Page 21

1 when you're trying to measure the market value of property.

2 THE COURT: Okay. Thank you.

3 For the lenders?

4 MR. KANSA: Good morning, Your Honor. Ken Kansa of  
5 Sidley Austin on behalf of the TPC lenders. I will address the  
6 points the Court has raised respecting the various positions of  
7 the lenders on the matters that have been raised in our briefs.

8 With respect, Your Honor, to the Court's first point  
9 as to how we believe the sale order should be read, we agree  
10 entirely with the Court. There are three components of the  
11 relevant clause of the sale order that need to be sussed out  
12 and given meaning here, and they need to be given meaning as a  
13 unified whole in their entirety: fair market value, under  
14 Section 506 of the Bankruptcy Code, and as of the date of the  
15 filing.

16 I don't believe there is disagreement between either  
17 ourselves or New GM that the relevant date here is the  
18 commencement date of June 1st, 2009.

19 I believe there is disagreement between ourselves and  
20 New GM on the point of fair market value. Your Honor has  
21 summed it up accurately, I believe, in saying that our view of  
22 fair market value is that it is a term of art. Collier's makes  
23 very clear that the court is always seeking to determine, in  
24 the context of a 506 valuation, fair market value. The  
25 question is how does one get to determining fair market value.

Page 22

1 And that goes through the analysis in Section 506 of the  
2 Bankruptcy Code where first the court determines the purpose of  
3 the valuation, which is, here, to value the TPC properties for  
4 the purposes of sizing the TPC lenders' secured claim, and then  
5 if that is something less than the 90.7 million face dollars of  
6 the claim, sizing the TPC lenders' unsecured deficiency claim  
7 to be paid from the bankruptcy estate.

8 The court then looks from the purpose to determine  
9 the -- the court then looks from the purpose of the valuation  
10 to determine -- excuse me; I'm just going through my notes,  
11 here. The court goes from the purpose of the valuation to  
12 determine the intended disposition or use of the property under  
13 Section 506 of the Bankruptcy Code. I think we have a  
14 fundamental disagreement with New GM on that point where they  
15 say there was a disposition, and they simply stop the analysis.  
16 We say there was a disposition, but the Court needs to take  
17 account of a disposition to whom and for what purpose.

18 New GM has made very clear their view that this was a  
19 sale to a distinct entity as counsel articulated at the podium.  
20 We agree with that. There was a sale of this property from Old  
21 GM to New GM. No one disputes that point. The purpose of that  
22 sale was so that New GM could continue using these facilities  
23 for precisely the same purpose in its business that Old GM had  
24 used the facilities in its business. The Court does not need  
25 to be, and there is nothing in the term "fair market value" or

Page 23

1 any other term that requires the Court to be willfully blind to  
2 that notion. The Court can and indeed should take account of  
3 it under the prevailing case law interpreting Section 506 of  
4 the Code and under the plain language of the second sentence of  
5 506 of the Code.

6 THE COURT: Mr. Kansa, of course, the Court can't be  
7 willfully blind, but doesn't that argument focusing on the  
8 particular purchaser prove too much? To take the silly or  
9 obvious example, if you have a sale to an insider who's going  
10 to continue the operation of the business previously engaged in  
11 by the deadbeat debtor and it's at a less than arm's length  
12 price, surely you wouldn't agree that that purchase can be a  
13 benchmark, or conversely, if the price is as the result of an  
14 old-fashioned 1980-style tender offer battle in which a white  
15 knight comes in to take the property and pays too much for it,  
16 I would have difficulties in seeing how that could be regarded  
17 as determinative, either.

18 It seems to me that at most you're entitled to is a  
19 legal principle that says that the value is to be measured as  
20 to what a particular purchaser would be willing to pay for that  
21 kind of asset for that kind of use in a transaction with an  
22 otherwise willing buyer and willing seller in an unmanipulated  
23 market.

24 MR. KANSA: I think we agree with all of those points,  
25 and if I can flesh that out, where what we would agree with is

Page 24

1 that the TPC lenders are entitled, here, to what a willing  
2 buyer and a willing seller engaged in this business would pay  
3 for a facility to manufacture the transmissions and the  
4 electric motors that are being manufactured in White Marsh or  
5 conduct the warehousing operations that are being conducted at  
6 the Memphis facility. There is an inherent value to that that  
7 comes to any purchaser that was willing, in effect, to step  
8 into that business and avoid the disruption of having to start  
9 afresh with a vacant facility as the New GM definition of fair  
10 market value would have us do. Here, there is a clear value  
11 for a purchaser coming into this business. Both of the parties  
12 are involved in the same business. We don't have to speculate  
13 to that; it's fact. And the real determination is now how do  
14 we set that price. That wasn't done at the time of the sale  
15 hearing, at least not with respect to these two facilities but  
16 as to the undifferentiated whole. Now we need to allocate that  
17 portion.

18 THE COURT: Mr. Kansa, it's increasingly rare in the  
19 cases on my watch, and I think in the cases on my colleagues'  
20 watch, that we have situations like this one where a secured  
21 lender has a lien on only a small subset of the debtor's  
22 assets. More commonly, secured lenders have a lien on  
23 everything the debtor's got. And sometimes, people bid in that  
24 environment; sometimes they credit bid in that environment.  
25 How does your analysis work when the secured lender has a lien

Page 25

1 on everything the debtor's got?

2 MR. KANSA: Your Honor, if the -- the answer, I think,  
3 in this context, Your Honor, is that the question would not  
4 arise in that context. If the secured lender, if the TPC  
5 lenders had had a lien on all of the assets of Old GM at the  
6 time that the sale order was being considered, all or whatever  
7 percentage of the purchase price allocable to all of the assets  
8 of Old GM would have come to the TPC lenders. There would have  
9 been a price that we could have looked to to say that is the  
10 value, and either we object to the sale, as secured lenders do,  
11 or we acquiesce in the sale and we take the allocable portion  
12 of the proceeds.

13 That wasn't done here. As Your Honor points out, we  
14 have a lien on only a small portion of the assets. It's not  
15 that we didn't try to get a value from Old GM and New GM as to  
16 what is that number so we can determine whether a credit bid,  
17 for example, would be feasible or whether we need to continue  
18 pressing our objections to the sale. Here, that factual  
19 situation simply didn't arise. And as a result, we have no  
20 price to shoot at, and the parties put that issue, if you will,  
21 in the refrigerator for two years, and now we have come back to  
22 this Court a couple years after the sale to hand the Court, if  
23 you will, the unenviable task of putting Humpty back together  
24 again, a bit, and trying to get a determination of what New GM  
25 should have paid Old GM for these facilities in 2009 knowing

Page 26

1 what New GM and Old GM and everyone in the room knew at the  
2 time, which is that these facilities were going to continue to  
3 be used as part of the New GM business.

4 Your Honor, if I may turn to the discussion of fair  
5 market value, I think we have largely subsumed that in our  
6 colloquy, but our view is that that is more of a term of art  
7 than the specific dictionary definition that counsel for New GM  
8 has referred to. The statement that everyone was, when they  
9 were drafting the sale order in July of 2009, looking to a  
10 dictionary definition to determine what the definition of fair  
11 market value for use in that order was is fantasy. It is not  
12 true. The parties were looking to, as bankruptcy lawyers,  
13 standard bankruptcy concepts of fair market value. And courts  
14 uniformly say under 506, we are looking to determine the fair  
15 market value of that transaction.

16 The question remains how and what valuation  
17 methodology should this Court apply to reach that valuation.  
18 And I think the Court has hit it on the head in saying we are  
19 looking to establish a valuation as to what a willing buyer  
20 would pay a willing seller when both of them are engaged in  
21 this business for the purposes of this transaction. And that  
22 is what we are asking the Court to ascertain as the valuation  
23 standard for this property so we can determine our claims.

24 THE COURT: Mr. Kansa, neither side asked me for an  
25 evidentiary hearing. And that would seemingly be appropriate

Page 27

1 for one of two leading contender reasons -- there may be  
2 another -- one being that you don't perceive fair market value  
3 as ambiguous, or the other being that neither side said  
4 anything out of its mouth that could be used as evidence in  
5 parol evidence context or perhaps some reason that I didn't  
6 think of. Which of those is it, and would you confirm for me  
7 that you're not asking me to conduct an evidentiary hearing?

8 MR. KANSA: I confirm that I'm not asking you to  
9 conduct an evidentiary hearing, Your Honor, and there is  
10 nothing that I seek to introduce here by way of saying that any  
11 party made any admission of what fair market value was or  
12 wasn't. I'm simply endeavoring to respond to the contentions  
13 of counsel for New GM that everyone had a particular value in  
14 mind or had a particular definition of fair market value in  
15 mind at the time of the sale hearing. I just don't think  
16 that's the case, Your Honor.

17 THE COURT: Well, I assume that consistent with what  
18 we learn in first year contracts, you're not relying on  
19 anything that wasn't expressed to the other side?

20 MR. KANSA: Absolutely not, Your Honor.

21 THE COURT: Okay.

22 MR. KANSA: Your Honor, if I may, I'd like to turn  
23 next to the Court's questions on how does Rash apply, and I  
24 think our briefing makes, perhaps not as plain as it should  
25 have, but our purpose in relying on Rash is for the general

Page 28

1 principles that this Court should be looking to the actual  
2 transaction that took place, rather than a hypothetical or a  
3 possible transaction that could take place which is, I submit,  
4 what New GM is looking to put the Court to. We are asking the  
5 Court to value the sale of these two facilities from Old GM to  
6 New GM as of June 1st, 2009, and nothing more. There's no real  
7 dispute that that was the disposition here.

8               Rash makes plain that a court is to look at that  
9 transaction and not the transaction taking place between this  
10 particular seller and a hypothetical generic purchaser, to use  
11 the term that New GM has used for their purposes. We are not,  
12 I think, arguing that Rash and -- or that there was an implied  
13 retention by the debtor in this case. We recognize that there  
14 was a sale, and I don't think that's seriously disputed. We  
15 are very cognizant of that. And what we are saying here is  
16 when the Court looks to the disposition that took place here  
17 for its 506 analysis, it needs to look at what actually  
18 happened. And we steer the Court towards the actual  
19 transaction that took place, and New GM looks to steer the  
20 Court away from that towards a transaction that took place  
21 between this seller and some party that was never involved in  
22 the transaction for the purpose of not -- not for the purpose  
23 of continued automotive manufacture or auto parts manufacture  
24 but for some unspecified generic industrial purpose. I think  
25 Rash, for that proposition, is not -- is applicable not just in

Page 29

1 Chapter 13 cases but Chapter 11 cases, and I don't think there  
2 is very serious question as to the applicability in that  
3 scenario.

4 The one case that we have put into our papers from the  
5 District of New Hampshire, the Clarkeies decision, makes clear  
6 that the logic of Rash applies where you have a, in that case,  
7 a transfer of secured creditor A's collateral to secured  
8 creditor B but with the acquiescence, if you will, of secured  
9 creditor A, or at least the nonobjection. The valuation of  
10 that collateral could have been done at the lower liquidation  
11 value or the higher going concern value, and the court held  
12 that it was appropriate to value that property at the higher  
13 going concern value precisely because the property had not been  
14 liquidated by secured creditor B but had been used by secured  
15 creditor B in continuing to operate the debtor's business after  
16 that relief from the stay was granted by the bankruptcy court.  
17 That is the sort of scenario where we envision Rash being  
18 applicable, Your Honor. Look to the transaction that actually  
19 occurred rather than a hypothetical possible transaction that  
20 we know, here, never did, in fact, occur.

21 Your Honor, I then come back to the Court's last point  
22 at the outset, which is the definition of value and use. I  
23 think we've covered that in large measure in our colloquy, but  
24 the TPC lenders are looking, here, to get a valuation that  
25 measures what a willing buyer would pay a willing seller in

Page 30

1 this business under the circumstances of this transaction.  
2 What is the price that New GM should have paid Old GM here on  
3 June 1st of 2009 or what -- under the transaction that was  
4 contemplated as of June 1st, 2009. That is what we are asking  
5 the Court to value here, and that is what we submit is the  
6 appropriate legal standard.

7 THE COURT: Okay. Anything else, Mr. Kansa?

8 MR. KANSA: Your Honor, the only thing I would do is  
9 apologize to the Court and Mr. Steinberg for my body language  
10 earlier. I do apologize for that and regret that.

11 THE COURT: Okay, thank you.

12 Mr. Steinberg?

13 MR. STEINBERG: Your Honor, the concept of value and  
14 use which is where the big swing is, is based on the cost test.  
15 The predicate for the cost test, the opening element of the  
16 cost test is replacement value. It's not a market value test.  
17 It's based on the cost of, in effect, rebuilding the asset.  
18 And then there's some deductions that are made.

19 The standard that my colleague is talking about, which  
20 is that people had to look at what the market would test as to  
21 this sale, is the fair market value test. And in particular,  
22 its primary focus is the sales comparison component of the fair  
23 market value test as reflected both in our appraisal and their  
24 appraisal.

25 And the definition of fair market value -- and I was

Page 31

1 trying to figure out how to say this -- if something is a term  
2 of art and is referenced generally in a dictionary, then  
3 whether people had a discussion about it or not, when they  
4 write it in an order, it has a meaning. It has a generalized  
5 meaning that both people understand. In the appraisal, and  
6 remember, we're trying to distinguish between market value and  
7 value and use, in their appraisal, when defining what market  
8 value is, it says the most probable price which a party should  
9 bring in a competitive and open market under all conditions  
10 requisite to a fair sale. He's arguing -- he's using the word  
11 "value and use", but his entire argument is a market value, a  
12 fair market value construct.

13 Your Honor, in almost all ca -- I can't think of a  
14 case where someone would ask you to value an asset from the  
15 buyer's perspective as compared to from the market's  
16 perspective. If a buyer is in -- a financial buyer versus a  
17 specialized buyer, a strategic buyer in the industry, and the  
18 fact that they can achieve certain synergies by buying the  
19 asset and therefore, they have a competitive advantage. All of  
20 that is reflected when people do a sales comparison test as to  
21 what the market would pay from either a strategic buyer or a  
22 financial buyer. And that's the sales market test, that's part  
23 of fair market value, and it's distinctly not pat of value and  
24 use. A market, the marketplace, would've test the fact that  
25 something was overbuilt, whether it's Global Crossing

Page 32

1 overbuilding its fiber optic network, whether it's New GM  
2 recognizing that in the prior context, it maybe shouldn't have  
3 put air conditioning in the Tennessee distribution unit. That  
4 would be reflected in the value. That's a fair market value  
5 test. Under a value and use concept, they just cross that out.

6 The market, whether it's a person who's a strategic or  
7 a financial buyer would have tested what the economic  
8 conditions were at the time of the sale. That kind of  
9 obsolescence, that economic obsolescence test, is not built  
10 into the value and use concept, and it has to. No bankruptcy  
11 judge that I'm aware of would look at an asset sale and say you  
12 know what, I'm ignoring what it means from the marketplace, I'm  
13 ignoring what it means from the debtor, I'm only going to focus  
14 as to what the buyer can do with this property, and that is how  
15 I'm going to value something. That's not a test. That's not  
16 something that's grounded in law. But that's what they're  
17 asking you to do. And when reality is that when one looks at  
18 the transcript here, one will see that every once in a while,  
19 he drifts back into saying, Judge, what I'm really asking to  
20 you is what a willing buyer and a willing seller in the  
21 industry would pay for this, and that's the fair market value  
22 test. I will say that it's not limited to the industry. I  
23 think that the fair market value test is not what someone in  
24 the industry would pay; it's what someone in the marketplace  
25 would buy. It may be that this distribution center sits on top

Page 33

1 of an oil well and that you're better off knocking it down as a  
2 distribution center and building it for production of what's  
3 inside the ground. And then someone should pay for that, and  
4 that's what the appropriate valuation is. It's not limited to  
5 what's in the industry.

6           But in either event, it's based on the market test.  
7 And I think when Your Honor took the bench, you were saying,  
8 shouldn't I take into account what this thing is being dealt  
9 with, and I think the answer is yes. All of that are factors  
10 for purpose of determining what the market will perceive what  
11 the value is. And that's what we were -- that was the only way  
12 you can test it. That's the only way that you can have a trial  
13 in this thing.

14           And therefore, my general comment is that you can't  
15 predicate this valuation based on a cost concept which is  
16 predicated solely on replacement value which is discredited by  
17 their own appraiser. You have to be able to do it on what the  
18 appraiser said is the most important factor for purposes of  
19 valuing the property, which is either a sales context in the  
20 context of one property and maybe even an income capitalization  
21 test where they thought there was a -- there could be a robust  
22 market to, in effect, lease out the facility. But that's what  
23 the market test is, and that's what we think we were being  
24 asked to measure when the objection to the sale was finessed.  
25 That's it.

Page 34

1                   THE COURT: Before you sit down, remember the  
2 questions I asked Mr. Kansa? You're not looking for an  
3 evidentiary hearing either?

4                   MR. STEINBERG: No, I'm not, Your Honor.

5                   THE COURT: And you're not seeking to rely in any way  
6 on parol evidence?

7                   MR. STEINBERG: That's correct, Your Honor.

8                   THE COURT: Okay. Mr. Kansa, any surreply?

9                   MR. KANSA: Your Honor, I'd offer only one brief  
10 rebuttal point, and that's that the appraisals in this matter  
11 don't drive the legal standard. We are here at the request of  
12 New GM to determine what the effective legal standard is for  
13 valuing this property, and what New GM, I think, has done here  
14 is come in and said the legal standard is we have an appraisal  
15 that we believe is more accurate, and we believe that the  
16 definition of fair market value from that appraisal should be  
17 the standard that is applied by the Court. It's not within the  
18 capacity of the appraisers to make the point to the parties or  
19 to this Court as to what the legal standard of fair market  
20 value in the context of a 506 sale is. We have the statute and  
21 we have the case law to do that, and I urge the Court to view  
22 the appraisals, in essence, as a red herring at this point. If  
23 we're due to have a future evidentiary hearing on the  
24 appraisals, we can have those; we can the valuation hearing.  
25 That is -- that was the subject of our initial motion that

Page 35

1 kicked this process off. But the appraisals themselves should  
2 not be driving the Court's decision today of what the  
3 appropriate legal standard is. That's really an issue for  
4 another day.

5 THE COURT: All right, thank you.

6 MR. KANSA: Thank you, Your Honor.

7 THE COURT: Okay, gentlemen, I'm going to take this  
8 under submission, and I'll get you a decision as soon as  
9 circumstances permit. We're adjourned.

10 (Whereupon these proceedings were concluded at 10:40 AM)

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Page 36

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2 C E R T I F I C A T I O N

3

4 I, Dena Page, certify that the foregoing transcript is a true  
5 and accurate record of the proceedings.

6

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